Burden of Proof in Investment Treaty Arbitration: Shifting?

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I. Introduction

In the recent past, *C. F. Amerasinghe*, a prominent Professor and expert in the field of international litigation, warned:

> It is not the formal position of the parties that necessarily determines the burden of proof. It is rather what the law requires to be proved that will ultimately determine who must prove it.[1]

On his part, more than three decades ago, the late *Durward Sandifer* was extremely reluctant towards recognizing the existence of presumptions at the level of international law. In particular, he cautioned:

> It [the law of presumptions] is dependent upon *a superior authority with power to define the presumptions and the inferences to be drawn from them and to prescribe the consequences for the burden of proof upon the parties*.[2] (emphasis added)

But what is the merit of the aforementioned sayings today vis-à-vis the adjudication of investment disputes, especially when investment tribunals have to interpret and apply the same legal provision? How do they allocate the burden of proof when so-called restrictions on the *onus probandi actori incumbit* rule are present? Does the *onus probandi* rule actually offer a workable instrument towards the proper administration of justice?

II. *Onus Probandi* Rule: Definition and Relevance

The notion "burden of proof" describes a fundamental principle required for a fair trial, namely the obligation to prove.[3] In particular, it determines who has the onus of proving the allegations made in a judicial proceeding.[4] The general principle concerning the

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[1] C. Amerasinghe, Evidence in International Litigation (2005), 66.

[2] D. Sandifer, Evidence Before International Tribunals (1975), 141-142.

[3] Amerasinghe, *supra* n. 1, 34, 61.

[4] For a general overview see C. Brown, A Common Law of International Adjudication (2007), 92-97.

burden of proof is encapsulated in the Latin maxim *onus probandi actori incumbit*. Accordingly, irrespective of who is the claimant or the respondent in a specific case, the party making an allegation bears the burden of proving it. The aforementioned principle, which reflects the civil law understanding of the concept "burden of proof",[5] is generally recognized and applied by International Courts and Tribunals.[6] Nonetheless, the vast majority of their constitutive instruments or procedural rules do not contain any provision on the burden of proof. For example, only exceptionally, Art. 24(1) of the UNCITRAL Arbitration Rules or Article 24(1) of the Statute of the Iran-United States Claims Tribunal provides that "each party has the burden of proving the facts relied on to support his claim or defense." Needless to say, Tribunals established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) as well as under the North American Free Trade Agreement (NAFTA) have characterized the *onus probandi* rule as a "general principle of international procedure".[7] For instance, referring to the award in *AAPL v Sri Lanka* which dealt with the issue of the burden of proof as well as with aspects of evidence in a detailed manner, the Tribunal in *Tokios Tokelés v Ukraine* stated that "the burden of demonstrating the impact of the state action indisputably rests on the Claimant".[8] Similarly, the decision delivered in *Salini v Jordan* reaffirmed that it "is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim".[9]

The *onus probandi* rule is of special importance in cases where the parties to a dispute submit evidence of equal force. In such instances, by virtue of this rule, the case will be

[5] Sandifer, *supra* n. 2, 127; Brown, *ibid*., 93.
[6] M. Kazazi, Burden of Proof and Related Issues (1996), 369; Sandifer, *supra* n. 2, 127.
[7] See, e.g., *Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, para. 74, available at http://ita.law.uvic.ca/documents/tradex_award.pdf; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 89 *et seq*., available at http://ita.law.uvic.ca/documents/MECement-award.pdf; *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Jurisdiction, 7 July 2004, para. 58, available at http://ita.law.uvic.ca/documents/Soufraki_000.pdf.
[8] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 121, available at http://ita.law.uvic.ca/documents/TokiosAward.pdf.
[9] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006, para. 70, available at http://ita.law.uvic.ca/documents/SalinivJordanAward-IncludingAnnex.pdf.

decided against the party bearing the burden of proof.[10] In other words, the *onus probandi* principle can be understood as a risk-defining rule, since the party who must prove a fact takes the risk of its non-establishment.[11] Indeed, as regards disputes brought before the International Court of Justice, it has been stated that a party achieving to bring itself in the position of the opponent may have a considerable advantage for receiving an award to its favour.[12] As will be illustrated below, for that reason, the question of the allocation of the burden of proof became a central issue in the investment jurisprudence concerning the clauses on national treatment as well as the emergency-related provisions laid down in investment treaties.

Furthermore, the burden of proof may affect the allocation of the arbitration costs as well as the legitimacy of an award. For example, the majority of the Tribunal in *Salini v Jordan* awarded heavier costs than investment Tribunals usually order because the claimants proved to be unable to satisfy their burden of proof.[13] As regards the legitimacy, an erroneous allocation of the burden of proof may constitute a ground for setting aside an arbitration award either by way of a vacatur before national courts or by way of annulment pursuant to Article 53(1) of the ICSID Convention.[14] Nonetheless, the vacatur proceedings in *Thunderbird v Mexico* and *Feldman v Mexico*, on the one hand, and the annulment procedures in *Amco I*, *Klöckner II*, *Wena v Egypt* and *Soufraki v Arab Emirates* on the other, imply, that the likelihood of success of such actions is rather limited.

[10] M. Aghahosseini/Z. Mousavi, The Burden and Standard of Proof in the Case Law of the Iran-United States Claims Tribunal, Global Community (2007),105, 111; Amerasinghe, *supra* n. 1, 36; see also the award *Salini*, *ibid*., para. 103.
[11] R. Kolb, General Principles of Procedural Law, in A. Zimmermann/C. Tomuschat/K. Oellers-Frahm (eds.), The Statute of the International Court of Justice: A Commentary (2006), 793, 819 margin note 45.
[12] See Kolb, *ibid*., 819 margin note 46; G. Fitzmaurice, The Law and Procedure of the International Court of Justice (1995) Vol. II, 576.
[13] See the Declaration of Sir I. Sinclair in *Salini*, *supra* n. 9, page two, paragraphs one and three. But see also the detailed analysis of T. Wälde in his Separate Opinion in the case of *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, para. 124 *et seq*., available at http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf.
[14] See C. Schreuer, The ICSID Convention. A Commentary (2001), 981-982, margin notes 256-261; A. Reiner, Burden and General Standards of Proof, Arbitration International, Vol. 10 (1994), 328, 331.

III. Restrictions on the *Onus Probandi* Rule

Yet, there are certain elements which can restrict the applicability of the *onus probandi actori incumbit* rule.[15] Of particular importance, in this respect, are (i) the principle of cooperation and equity, (ii) adverse inferences, (iii) presumptions, (iv) applicable law and (v) dogmatic issues. In some instances, as will be seen primarily under (iii) and (iv) below, the lack of a common understanding regarding the interpretation of the very same provision laid down in an investment treaty has led tribunals to apply presumptions incoherently and to adjudicate disputes on the basis of totally different international law standards, thus giving the impression that the burden of proof constitutes a sort of a "shifting factor."

i) Principle of Cooperation and Equity

The principle of cooperation relates primarily to the assistance of the Tribunal by the parties in its effort to collect evidence in order to adjudicate the dispute brought before it properly.[16] It should be born in mind from the outset that the principle of cooperation does not shift the burden of proof; it rather complements the *onus probandi* principle.[17] In turn, by virtue of the principle of equity, tribunals may ease the harshness of a rule when the particular circumstances of the case demand it.[18] The relationship between these two elements is vividly illustrated in the *Amco v Indonesia* award.[19] In this procedure, the ICSID Tribunal faced particular difficulties when it came to calculate the amount invested by the claimant. In fact, the evidence submitted by the parties to the dispute was insufficient. On the other hand, the Tribunal confirmed that the parties were more than

[15] See Kolb, *supra* n. 11, 820 *et seq*. and the references therein.
[16] For instance, ICSID Arbitration Rule 34(3) provides: "The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). Similarly, Article 24(3) UNCITRAL Rules establishes: "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."
[17] See, in particular, Amerasinghe, *supra* n. 1, 97-98, 115 (iii); Kazazi, *supra* n. 6, 223; Kolb, *supra* n. 11, 828-829.
[18] See, in particular, C. Tomuschat, International Law: Ensuring the Survival of Mankind in the Eve of a New Century, RdC Vol. 281 (1999), 23, 346-347.
[19] *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, ICSID Rep. Vol. 1, 413 *et seq*.

willing to co-operate with the Tribunal.[20] The initial award, which additionally acknowledged that it was "difficult to strictly share in the instant case the *onus probandi* in respect of the amount of the investment realized", was challenged by the respondent before the ICSID *ad hoc Committee*.[21] In particular, Indonesia complained for unequal treatment in the distribution of the burden of proof. Upholding the allocation of burden of proof in the initial award, the *ad hoc Committee* noticed that, in fact, the *Amco* Tribunal had taken into account, first, that a reasonably prudent foreign non-resident investor may be expected to keep copies of important documents outside the host state and, second, that the relatively low capability of an administrative agency efficiently to store and monitor and enforce the submission of formally required documentation is commonly a reflection of the realities of developing countries, and not an indication of bad faith towards investors.[22] It appears, therefore, that, when evidence is insufficient, the cooperative spirit of the parties towards the Tribunal's investigations as well as considerable differences in their capabilities can result in a relaxation of the *onus probandi actori incumbit* principle.

ii) Adverse Inferences

While the duty of co-operation is based on good faith efforts of the parties to supply evidence,[23] the drawing of adverse inferences might come into play when the element of such a co-operation with the relevant tribunal is lacking. Given that arbitrators, usually, cannot force parties to produce evidence, Tribunals may infer from established facts other facts, particularly, when parties are recalcitrant in the production of evidence.[24] Unlike in the case of presumptions, by virtue of adverse inferences the burden of proof does not

[20] *Ibid*., 486: "The insufficiency of of the investment is relied on by Respondent, to justify the revocation of the license, so that it could be said that it is to it to prove said insufficiency, and, indeed, the *Respondent did its best to assist the Tribunal* in this respect. On the other side, *Claimants* were obliged to invest a certain amount of capital, so that *they had to contribute as well to the Tribunal's investigations as to the effective realization of the promised investment, and so they did*." (emphasis added)
[21] *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, ICSID Rep. Vol. 1, 509 *et seq*.
[22] *Ibid*., 533.
[23] Kolb, *supra* n. 11, 828.
[24] J. Sharp, Drawing Adverse Inferences from the Non-Production of Evidence, Arbitration International Vol. 22 (2006), 549, 549; Sandifer, *supra* n. 2, 150. For example, ICSID Arbitration Rule 34(3) establishes: "The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure"

shift.[25] On the other hand, they affect it, since, if the opponent fails to disprove them, they can play a decisive role in the Tribunal's evaluation of whether the burden of proof has been met.[26] A representative example of adverse inferences constitutes, in this respect, the case *Feldman v Mexico*.[27] The issue at stake was whether Mexico had treated the investor in a discriminatory manner, thus violating Art. 1102 NAFTA. Due to the fact that Mexico, first, did not explain why it had not introduced evidence showing that the Mexican owned cigarette exporters had not been treated in a more favourable way than the investor and, second, insisted in seeking to demonstrate that the company of the investor and the state owned cigarette exporters were related, the majority of the Tribunal drew an inference against Mexico.[28] In this context, the Tribunal raised also the following rhetorical question:

> Why would any rational party have taken this approach at the hearing and in the briefs if it had information in its possession that would have shown that the Mexican owned cigarette exporters were being treated in the same manner as the Claimant, that is, denied IEPS rebates for cigarette exports where proper invoices were not available?[29]

Hence, the refusal of the defendant to provide evidence as well as the implied lack of good faith attitude during the proceedings gave rise to the Tribunal making an adverse inference. It should be noted, however, that recourse to technical tools such as adverse inferences needs extreme caution and should take place under special circumstances.[30] Indeed, the careful attitude of the Tribunals towards the inference proposals put forward by the claimants in the cases of *Methanex v USA* and *Rumeli/Telsim v Kazakhstan*, delivered in 2004 and 2008 respectively, appears to confirm this.[31]

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[25] Kolb, *supra* n. 11, 824.
[26] For further details see Kazazi, *supra* n. 6, 266 *et seq*.; Amerasinghe, *supra* n. 1, 227.
[27] *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, 16 December 2002, available at http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf.
[28] *Ibid*., para. 178.
[29] *Ibid*., para. 178.
[30] Kazazi, *supra* n. 6, 374. See also the attempt of Sharp, *supra* n. 24, 374, to rationalize the application of adverse inferences by laying down explicit conditions.
[31] *Methanex Corporation v. United States of America*, NAFTA, Final Award, 3 August 2005, Part II, Chapter C, page 14, para. 24, Part II, Chapter G, page 14, para. 25 available at http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 709-715, available at http://ita.law.uvic.ca/documents/Telsimaward.pdf.

iii) Presumptions

Legal presumptions play an important role in shifting the burden of proof from a party to a dispute to the other one.[32] Usually, on account of a norm, legal presumptions suppose mechanically that certain facts are given in a specific situation, without requiring them to be proved.[33] If a presumption in favour of the proponent is established, then, the burden of proof shifts and, consequently, the opponent bears the burden to refute that presumption.[34] The arguments put forward in the still pending case of *Glamis v USA* are very illustrative in this regard. In particular, the investor claims that the significant severity of the economic effects of the state measures created a presumption against the USA that an indirect expropriation occurred, thus shifting the burden of proof to the host country which, in turn, has to refute the presumption by showing that "the public welfare purpose advanced for justifying the government measures' is legitimate."[35] The host state, for its part, contends:

> Glamis, not the United States, bears the burden of proving that an indirect expropriation has occurred. The burden does not shift to the United States merely because Glamis alleges to have demonstrated that it suffered injury. […] [T]he government's actions are *presumed* to be non-expropriatory. This is a presumption that Glamis cannot, on the facts of this case, overcome.[36] (footnotes omitted)

As the aforementioned arguments demonstrate, practically, imposing the burden to a party to refute a presumption may be decisive for the outcome of the award. Of course, in the final analysis, it is the adjudicator who decides on their applicability. Problems relative to the presumptions as they have emerged in investment jurisprudence may be well illustrated by reviewing some cases concerning the standard of national treatment laid down in Article 1102 NAFTA.

In order to interpret the notion "like circumstances" of Art. 1102, the majority of the Tribunal in *S.D. Myers v Canada* held that it was necessary "to keep in mind the overall

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[32] K-H. Böckstiegel, Presenting Evidence in International Arbitration, ICSID Rev./FILJ Vol. 16 (2001), 1, 3.
[33] Kolb, *supra* n. 11, 823.
[34] Kolb, *supra* n. 11, 823.
[35] Glamis Reply Memorial, 15 December 2006, para. 166, available at http://www.state.gov/documents/organization/78762.pdf.
[36] U.S. Rejoinder, 3 March 2007, page 55, available at http://www.state.gov/documents/organization/82700.pdf.

legal context in which the phrase appears."[37] Consequently, the Tribunal construed the clause in the light of the General Agreement on Tariffs and Trade (GATT) as follows:

> In the GATT context, a *prima facie* finding of discrimination in "like" cases often takes place within the overall GATT framework, which includes Article XX (General Exceptions). A finding of "likeness" does not dispose of the case. It may set the stage for an inquiry into whether the different treatment of situations found to be "like" is justified by legitimate public policy measures that are pursued in a reasonable manner.[38]

Indeed, as the aforementioned passage illustrates, according to the trade-law understanding of the distribution of the burden of proof, the opponent bears the burden of proving the legitimacy of its measures, when the proponent establishes that the challenged party has violated a particular provision.[39] This "shifting" results from the fact that a violation of Art. III GATT containing the national treatment principle can be only justified if the respondent establishes one of the exceptions laid down in Art. XX GATT.[40] Be that as it may, from a methodological viewpoint, the present award appears to have construed Article 1102 on the basis of Art. 31(3)c of the Vienna Convention on the Law of Treaties (VCLT) according to which the contextual/systematic interpretation comprises additionally "any relevant rules of international law applicable in the relations between the parties".[41] Thereby, the *Myers* decision introduced the trade-law method vis-à-vis the distribution of the burden of proof for claims concerning the violation of Art. 1102 NAFTA. Endorsing the wide contextual approach adopted in *Myers*, the Tribunal in *Pope & Talbot v Canada* elaborated on the distribution of the burden of proof pursuant to Art. 1102 as follows:

> In evaluating the implication of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2), should be compared with that accorded domestic investments in the same business or economic sector. However, that first step is not the last one. Differences in treatment will *presumptively* violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto,* between foreign-

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[37] *S.D. Myers, Inc. v. Canada* , UNICTRAL (NAFTA), Partial Award, 13 November 2000, para. 245, available at http://ita.law.uvic.ca/chronological_list.htm.
[38] *Ibid*., para. 246.
[39] M. Matsushita/T. Shoenbaum/P. Mavroidis, The World Trade Organization (2003), 38-39.
[40] See, e.g., *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R, 25 April 1997, page 16.
[41] In addition, during the course of its contextual interpretation the Tribunal had also recourse to NAFTA's "side agreement" NAAEC (North American Agreement on Environmental Co-operation) as well as to the OECD Declaration on International and Multinational Enterprises. See *Myers*, *supra* n. 37, para. 247-248.

> owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.[42] (footnotes omitted) (emphasis added)

In other words, by establishing a "differential treatment" under "like circumstances", the claimant creates a presumption that Article 1102 NAFTA has been violated. Then, the burden of proof shifts to the host state which has to prove that the discriminatory measures were justified by legitimate national policy considerations. The Tribunal in *Feldman v Mexico* followed this wide contextual understanding with its implications on the burden of proof as well.[43]

On the other hand, the award in *Methanex v USA* challenged the method hitherto applied by NAFTA Tribunals. While the investor invoking GATT and WTO case-law proposed a "shifting" of the burden of proof to the United States,[44] the Tribunal rejected this wide contextual approach by favouring a literal interpretation of the clause pursuant to the "ordinary meaning rule" laid down in Art. 31(1) VCLT.[45] Although this Tribunal did not take a crystal-clear position with respect to the distribution of the burden of proof under Art. 1102, it held:

> In order to sustain its claim under Article 1102(3), Methanex must demonstrate, cumulatively, that California intended to favour domestic investors by discriminating against foreign investors and that Methanex and the domestic investor supposedly being favored by California are in like circumstances.[46]

The passage implies that by rejecting a 31(3)c VCLT interpretation of the clause, the burden of proof as regards the establishment a violation of 1102 NAFTA does not shift; instead, it appears to be fully with the investor. This was, indeed, confirmed by the majority in case of *Thunderbird v Mexico*. In fact, this award emphasized that "in construing Article 1102 of the NAFTA, the Tribunal gives effect to the plain wording of the text."[47] Adopting a literal approach, the majority invoked the *onus probandi* principle

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[42] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2, 10 April 2001, para. 78, available at http://ita.law.uvic.ca/documents/Award_Merits2001_04_10_Pope.pdf.
[43] *Feldman*, *supra* n. 27, para. 184.
[44] *Methanex*, *supra* n. 31, Part IV, Chapter B, page 5, para. 9.
[45] *Methanex*, *supra* n. 31, Part IV, Chapter B, page 19, para. 37.
[46] *Methanex*, *supra* n. 31, Part IV, Chapter B, page 6, para. 12.
[47] *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, para. 175, available at http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf.

as laid down in Article 24(1) of the UNCITRAL Rules and, consequently, affirmed that the burden of proof lies completely with the investor by stating:

> Thunderbird must show that its investment received treatment less favourable than Mexico has accorded, in like circumstances, to investments of Mexican nationals.[48]
> […]
> [T]he text contemplates the case where a foreign investor is treated less favourably than a national investor. That case is to be proven by a foreign investor, and, additionally, the reason why there was a less favourable treatment.[49] (footnote omitted)

While Professor *Thomas Wälde*, in his Separate Opinion, warned the Tribunal for its departure from the previous presumption-oriented jurisprudence,[50] the Tribunal in *United Parcel v Canada* reaffirmed categorically:

> The Tribunal notes that there are three distinct elements which an investor must establish in order to prove that a Party has acted in a manner inconsistent with its obligations under article 1102.[51]
> […]
> Failure by the investor to establish one of those three elements will be fatal to its case. This *is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding article 1102*.[52] (emphasis added)

Thus, the case-law reviewed above concerning the national treatment standard under 1102 NAFTA reveals that the question whether the burden of proof shifts or not depends on the approach that each of the investment tribunals may adopt. In particular, according to the literal understanding, the burden of proof lies fully with the investor, while by virtue of a contextual interpretation pursuant to Art. 31(3)c VCLT Tribunals adopt a trade-law approach which, on account of a presumption, shifts the burden of proof to the host state and, consequently, the latter bears the burden of justifying the legality of its actions.

iv) Applicable Law

Of course, the burden of proof might be considerably affected by the law applicable to a particular dispute, since distinct legal norms may distribute the burden of proof

[48] *Ibid*., para. 176.
[49] *Ibid*., para. 177.
[50] See *supra* n. 13, para. 105.
[51] *United Parcel Service v. Canada*, UNCITRAL (NAFTA), Award on the Merits, 24 May 2007, para. 83, available at http://ita.law.uvic.ca/documents/UPS-Merits.pdf.
[52] *Ibid*., para. 84.

differently.[53] The methodological disparities among investment tribunals vis-à-vis the plea of necessity may constitute the clearest example in this regard. In particular, in a series of cases, Argentina invoked state of necessity both under customary law and under the necessity clause laid down in Article XI of the 1991 Argentina-US Bilateral Investment Treaty (BIT) in order to exclude its responsibility for violations of the BIT resulting from the national emergency measures it adopted during its financial crisis. The relevant investment awards can be classified into two different streams.

The first stream of investment jurisprudence, in particular the awards *CMS*, *Enron* and *Sempra* handed down in 2005, 2007 and 2007 respectively, construed the emergency clause of the BIT in the light of the customary necessity as reflected in ILC Article 25.[54] In other words, by interpreting Art. XI of the BIT on the basis of Art. 31(3)c VCLT, this set of awards subjected the emergency test to the rigorous conditions laid down in ILC Article 25.[55] Consequently, Argentina, the proponent of necessity, had to prove, *inter alia*, that the measures adopted were the "only way" to respond to the crisis as well as that it had "not contributed to the situation of necessity". In fact, just like in case Art. XX GATT, the party invoking an exception such as the "state of necessity" bears the burden of proving it. Indeed, the ILC Commentary on the Draft Articles on State Responsibility of 2001 reaffirms:

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[53] See, for instance, Reiner, *supra* n. 14, 330.

[54] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 315 *et seq*., available at http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 294 *et seq*., available at http://ita.law.uvic.ca/documents/Enron-Award.pdf; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 333 *et seq*., available at http://ita.law.uvic.ca/documents/SempraAward.pdf.

[55] See *Sempra*, *ibid*., 378: "Nor does the Tribunal believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle."
Article 25 provides: "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
(*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
(*a*) The international obligation in question excludes the possibility of invoking necessity; or
(*b*) The State has contributed to the situation of necessity."

> In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V [Circumstances Precluding Wrongfulness] are recognized by many legal systems, often under the same designation.[56] (footnote omitted)
> […]
> Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and *the onus lies on that State to justify or excuse its conduct*.[57] (emphasis added)

In the end, all three awards rejected the plea of necessity deciding, *inter alia*, that Argentina had contributed to the crisis and that the measures it adopted were not the only way at its disposal.

The awards in *LG&E* and *Continental Casualty*, handed down in 2006 and 2008 respectively, illustrate the opposite stream of investment jurisprudence. In fact, by following different methodologies than in *CMS*, *Enron* and *Sempra*, the respective Tribunals applied different legal norms vis-à-vis the state of necessity, thus setting distinct necessity standards which, in turn, affected the allocation of the burden of proof considerably. In particular, the *LG&E* Tribunal considered Article XI as *lex specialis* to the customary standard of necessity.[58] Accordingly, instead of applying the customary "only way" test, the Tribunal examined whether the measures adopted by Argentina were a legitimate, necessary and reasonable response to the crisis in a way that reminds one of the proportionality test undertaken by the European Court of Human Rights (ECtHR).[59] And, in particular, once the investor contented that the measures implemented by Argentina were not the "only means" available to respond the crisis", the Tribunal rejected this assertion, since:

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[56] J. Crawford, The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentary (2002), 162, margin note 7.
[57] *Ibid*., 162, margin note 8.
[58] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 205-206, available at http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf.
[59] *Ibid*., para. 239-242. For such an interpretative approach see W. Burke-White/A. v. Staden, Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, University of Pennsylvania Law School, Scholarship at Penn Law, Paper 152 (April 2007), 27-28, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1156&context=upenn/wps.

> Article XI refers to situations in which a State has no choice but to act. *A State may have several responses* at its disposal to maintain public order or protect its essential security interests.[60] (emphasis added)

At this point, the Tribunal appears to recognise that Argentina has a right to choose among several responses, thus conferring to the proponent of necessity a "margin of appreciation", that is, discretion as regards the proper response to the economic crisis similar to that afforded by the ECtHR to the states in cases of public emergency under Article 15 of the European Convention on Human Rights (ECHR).[61] In addition, when the Tribunal came to deal with the "no contribution requirement", it stated:

> The Tribunal considers that, in the first place, *Claimants have not proved* that Argentina has contributed to cause the severe crisis faced by the country. [62] (emphasis added)

Unlike the awards in *CMS*, *Enron* and *Sempra*, in the present case, the burden of proof concerning the "no contribution condition" shifted from the proponent to the opponent, namely to the investor. This very "shifting" has been criticized[63] as "dubious"[64] and "problematic"[65], since it occurred without any kind justification on the part of the Tribunal. In addition, it could also be argued that it is highly questionable whether the opponent-investor could ever be capable of providing persuasive information concerning the degree of contribution of the host country to the state of necessity. Indeed, as the ILC Commentary establishes, "it is often the case that only that State is fully aware of the facts which might excuse its non-performance".[66] On the other hand, such an allocation of the burden of proof appears less inconsistent if someone bears in mind that (1) by applying the Article XI of the BIT instead of customary law, the *LG&E* Tribunal introduced a proportionality test, (2) by permitting to choose from several responses, it afforded to Argentina, though not expressly, a "margin of appreciation" and, finally, (3)

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[60] *Ibid*., para. 239.
[61] See, e.g., R. St. J. Macdonald, The Margin of Appreciation, in R. St. J. Macdonald *et al.* (eds), The European System for the Protection of Human Rights (1993), 83, 85-86; C. Grabenwarter, Europäische Menschenrechtskonvention (3rd ed., 2008) 12, margin note 10.
[62] *Ibid*., para. 256.
[63] See, in particular, A. Reinisch, Necessity in International Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina, Journal of World Investment and Trade Vol. 8 (2007), 191, 203.
[64] M. Waibel, Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E, Leiden Journal of International Law, Vol. 20 (2007), 637, 642.
[65] S. Schill, International Investment Law and the Host State's Power to Handle Economic Crises-*Comment on the ICSID Decision in LG&E v. Argentina,* Journal of International Arbitration Vol. 24 (2007), 265, 280
[66] Crawford, *supra* n. 56, 162, margin note 8.

by stating that it considers that "the attitude adopted by the Argentine Government has shown a desire to slow down by all the means available the severity of the crisis", it appeared to take also into account a *bona fides* attempt by Argentina to attenuate the impacts of the crisis. As a whole, the aforementioned elements remind rather of the methodology applied by the ECtHR when it has to apply Art. 15 ECHR, a methodology which confers on states a benefit of doubt in cases of emergency, thus easing their burden of proof considerably.[67] Following the same approach as the *LG&E* award, the *Continental Casualty* Tribunal accepted the plea of necessity as well, and, by affording to Argentina a "margin of appreciation" explicitly,[68] it abstained from considering Argentina's contribution to the crisis simply because it had to apply Art. XI of the BIT, instead of the customary standard.[69]

Hence, the jurisprudence reviewed reveals that the allocation of the burden of proof as regards the existence of necessity varies according to the legal norms each Tribunal applies. On the one hand, the interpretation of the BIT in the light of customary necessity puts on Argentina the heavy burden of proving the fulfillment of the requirements laid down in ILC Art. 25, while, on the other hand, the *lex specialis* understanding relaxes Argentina's burden of proof considerably by introducing concepts such as proportionality test and margin of appreciation.

v) Dogmatic Issues

The awards in *Petrobart v Kyrgyz Republic* and *Plama v Bulgaria*, delivered in 2005 and 2008 respectively, underline how different dogmatic standpoints affect the distribution of the burden of proof with respect to the application of the denial of benefits clause under Art. 17(1) of the Energy Charter Treaty (ECT). The latter provision permits contracting parties to the ECT to deny the advantages of Part III (Investment Promotion and

[67] In this regard, see also S. Joseph/J. Schultz/M. Castan, The International Covenant on Civil and Political Rights (2nd ed., 2003), 835-836, margin note 25.74.
[68] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 181, available at http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf.
[69] *Ibid*., para. 234.

Protection) conferred upon a legal entity if two criteria are met cumulatively:[70] Citizens or nationals of a third state own or control such entity and that entity has no substantial business activities in the Area of the Contracting Party in which it is organized. In this regard, the Tribunal in *Petrobart* argued that the burden of proof was fully with the host country by stating:

> *As such, the denying Contracting Party must establish* (i) that the legal entity to which it wishes to deny the advantages of Part III of the Treaty is a legal entity owned or controlled by citizens or nationals of a third state, and (ii) that the entity in question has no substantial business activities in the Area of the Contracting Party in which such an entity is organised.[71] (emphasis added)

In fact, at this point, Article 17(1) appears to operate as a defence to the claims alleged by the investor.[72] In contrast, the *Plama* award did not share that dogmatic understanding, since - while the investor had acknowledged from the outset that it had had no substantial business activities[73] - the Tribunal put the burden of proving whether the investor is owned or controlled by a national or another contracting party on the claimant.[74]

IV. Conclusion

The jurisprudence concerning the standard of national treatment according to Art. 1102 NAFTA, the plea of necessity under Art. XI of the Argentina-US BIT as well as the denial of benefits clause pursuant to Art. 17(1) ECT demonstrates that the *onus probandi* principle, in all its simplistic glory, constitutes a Two-faced-Janus, since it is susceptible to the different methodological and dogmatic approaches which investment tribunals adopt. In fact, these different approaches determine the applicability or the inapplicability of presumptions as well as of distinct international standards, even when the relevant tribunals have to apply and interpret the same legal provision. It is, therefore,

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[70] *Petrobart Limited v. Kyrgyz Republic*, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, Award, 29 March 2005, page 59, available at http://ita.law.uvic.ca/documents/petrobart_kyrgyz.pdf; C. Yannaca-Small, Definition of Investor and Investment in International Investment Agreements, in International Investment Law: Understanding Concepts and Tracking Innovations, OECD 2008, 30, available at http://www.oecd.org/dataoecd/3/7/40471468.pdf.

[71] *Ibid*., 59.

[72] Cf. *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 145, available at http://ita.law.uvic.ca/documents/plamavbulgaria.pdf.

[73] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 81, available at http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf.

[74] *Ibid*., 82, 89, 94.

questionable whether such approach-dependent "shiftings" of the burden of proof could ever be beneficial to the proper administration of justice. And while the confirmation of the warning from Professor *C. F. Amerasinghe* referred to in the introduction of this paper becomes inescapable, the call for a creation of, to use the words of the respected *Durward Sandifer,* "a superior authority with power to define the presumptions and the inferences to be drawn from them and to prescribe the consequences for the burden of proof upon the parties" holds good.[75]

[75] See, e.g., A. Tsatsos, Die Rechtsprechung der ICSID-Schiedsgerichte: Zwischen Homogenität und Heterogenität (Die Debatte über die Schaffung einer ICSID-Berufungsinstanz), Dissertation, Berlin, submitted on 8 October 2007, available at http://edoc.hu-berlin.de/dissertationen/tsatsos-aristidis-2008-01-31/PDF/tsatsos.pdf; A. H. Qureshi, An Appellate System in International Investment Arbitration?, in Muchlinski/F. Ortino/ C. Schreuer, The Oxford Handbook of International Investment Law (2008), 1154 *et seq*; C. Tams, An Appealing Option? The Debate about an ICSID Appellate Structure, Essays in Transnational Economic Law No. 57 (June 2006); D. Gantz, An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges, Vanderbilt Journal of Transnational Law Vol. 39 (2006), 39 *et seq*.; British Institute of International and Comparative Law's Investment Treaty Forum, Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?, Transnational Dispute Management Vol. 2 (April 2005), 6-27, 60-77.